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Chong Lee Fah v The New Straits Times Press (M) Bhd & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R1–25–71 OF 2003

B RAUS SHARIF J

18 OCTOBER 2005

Labour Law — Employment — Dismissal — Constructive dismissal — Transfer of employee to its subsidiary company — Terms and conditions less favorable — Restrictions on such transfer — Industrial Relation Act 1967 s 13

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This was an application by the applicant for an order of certiorari to quash the Industrial Court award whereby the applicant's claim for constructive dismissal was dismissed by the Industrial Court. The main issue before this court was whether the

D first respondent had breached a fundamental terms of the contract of employment with the applicant when it made the decision to transfer the applicant to its subsidiary company, AMAL. It was the contention of the first respondent that it had the right to transfer the applicant to any associate or subsidiary companies within the first respondent group of companies. Reference was made to the applicant's letter of

E appointment dated 27 July 1977.

Held, allowing the application:

(1) It is an acceptable principle that the right to transfer an employee from one

F department to another and from one post of an establishment to another or from one branch to another or from one company to another within the organization is the prerogative of the management. In fact this right of transfer is embodied in the Industrial Relation Act 1967, where s 13 provides that a company has the right to transfer its employees within the organization so long

G as such transfer does not entail a change to the detrimental of an employee in regard to the terms of employment (see para 14).

(2) The Industrial Court concluded that the transfer of the applicant to AMAL 'was merely a transfer within the group'. This was not in light of the evidence adduced before the Industrial Court. If it was indeed a transfer as contended

H by the first respondent there would be no need for a fresh letter of employment. If it was indeed a transfer one does not need to utilize one's outstanding leave. Further, if it was indeed a transfer, one does not sign a new contract with new terms and conditions (see para 16).

(3) A cursory comparison of the basic terms such as salary, retirement benefits,

I medical benefits, hospitalization, working hours and annual leave, clearly indicated that the terms that the applicant was enjoying at the material time with the first respondent was far more superior that given by AMAL. The drastic change amounted to a fundamental breach of contract on the part of the first respondent and the applicant was right to consider herself constructively dismissed (see para 17).

(4) Reasonable inference could be drawn from the conduct of the first respondent that the transfer of applicant to AMAL was an attempt to avoid paying the applicant termination benefits following the closure of SRS (see para 18).

[Bahasa Malaysia summary

Ini adalah satu permohonan oleh pemohon untuk satu perintah certiorari bagi membatalkan award Mahkamah Perusahaan di mana tuntutan pemohon untuk pemecatan secara konstruktif telah ditolak oleh Mahkamah Perusahaan. Persoalan utama di hadapan mahkamah ini adalah sama ada responden pertama telah melanggar terma-terma utama kontrak pekerjaan dengan pemohon apabila ia membuat keputusan untuk memindahkan pemohon ke anak syarikatnya, AMAL. Adalah hujah responden pertama bahawa ia mempunyai hak untuk memindahkan pemohon ke mana-mana syarikat bersekutu atau anak syarikat dalam kumpulan syarikat responden pertama. Rujukan telah dibuat kepada surat perlantikan pemohon bertarikh 27 Julai 1977.

Diputuskan, membenarkan permohonan tersebut:

(1) Ia adalah satu prinsip yang boleh diterima bahawa hak untuk memindahkan seorang pekerja dari satu bahagian ke satu bahagian lain dan dari satu jawatan sebuah penubuhan ke satu jawatan lain atau dari satu cawangan ke satu cawangan lain atau dari satu syarikat ke satu syarikat lain dalam organisasi adalah satu prerogatif pengurusan. Bahkan hak untuk melakukan pemindahan ini termaktub dalam Akta Perhubungan Perusahaan 1967, di mana s 13 memperuntukkan bahawa sebuah syarikat mempunyai hak untuk memindahkan pekerja-pekerjanya dalam organisasi selagi pemindahan tersebut tidak melibatkan perubahan yang menjejaskan pekerja berkenaan terma-terma pekerjaan (lihat perenggan 14).

(2) Mahkamah Perusahaan memutuskan bahawa pemindahan pemohon ke AMAL 'hanya satu pemindahan dalam kumpulan syarikat-syarikat'. Ini tidak begitu apabila dilihat keterangan yang dikemukakan di hadapan Mahkamah Perusahaan. Jika ia sememangnya satu pemindahan sepertimana yang dihujahkan oleh responden pertama tidak perlulah ada satu surat pekerjaan yang baru. Jika ia sememangnya satu pemindahan seseorang tidak perlu menggunakan baki cuti tahunan. Tambahan pula, jika ia sememangnya satu pemindahan, seseorang itu tidak perlu menandatangani kontrak baru dengan terma-terma dan syarat-syarat baru (lihat perenggan 16).

(3) Perbandingan sepintas lalu berhubung terma-terma asas seperti gaji, faedah persaraan, faedah perubatan, rawatan hospital, waktu bekerja dan cuti tahunan, jelas menunjukkan bahawa pemohon menikmati faedah dan kemudahan yang lebih baik pada masa material dengan responden pertama daripada apa yang diberikan oleh AMAL. Perubahan besar ini membentuk satu perlanggaran utama kontrak di pihak responden pertama dan pemohon adalah betul untuk menganggap dirinya dipecat secara konstruktif (lihat perenggan 17).

(4) Inferens munasabah yang boleh disimpulkan daripada perlakuan responden pertama adalah bahawa pemindahan pemohon ke AMAL adalah satu percubaan untuk mengelakkan daripada membayar pemohon, faedah penamatan kerja berikutan penutupan SRS (lihat perenggan 18).]

Notes

For cases on dismissal generally, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 849–873.

Cases referred to

Ladang Holyrood v Ayasamy a/l Manikam & Ors [2004] 3 MLJ 339 (refd)
Wong Chee Hong v Cathay Organisation (M) Sdn Bhd [1988] 1 MLJ 92 (refd)

Legislation referred to

Industrial Relation Act 1967 s 13

Sumita Gnanarajah (Sumita & Associaites) for the applicant.
Rajeswari Karupiah (Jacinta Johnson with her) (Zul Rafique & Partners) for the respondent.

Raus Sharif J:

[1] This is an application by the applicant for an order of certiorari to quash the Industrial Court Award No 240 of 2003 handed down on 24 March 2003. In the award, the applicant's claim for constructive dismissal was dismissed by the Industrial Court.

Facts

[2] The relevant facts leading to this application are these. The applicant commenced employment with The New Straits Times Press (M) Bhd ('the first respondent') on 1 September 1977 as an Assistant to the Group Secretary vide a letter dated 22 July 1977. She was subsequently transferred to the position of Registrar of the Share Registration Section ('SRS') with effect from 1 April 1994.

[3] In November 1997, the applicant was informed by the first respondent that as a result of the closure of the SRS she would be transferred to a subsidiary known as Amal Assurance Bhd ('AMAL'). The applicant proposed a secondment instead of a transfer but this was rejected as it was contended by the first respondent that the policy at that time was to transfer and not to second employee.

[4] On 8 January 1998, the applicant was informed by the first respondent that the transfer would take effect on 15 January 1998 and that her service with AMAL would be regarded as being continuous, without deprivation of any benefits that the applicant enjoyed with the first respondent.

[5] By a letter dated 9 January 1998, the applicant sought further clarification on the terms and conditions of her redeployment to AMAL.

[6] AMAL, by a letter dated 13 January 1998 assured her of the continuity of service. However, on the following day, the applicant by way of a letter informed the first respondent that she was unable to accept the offer of employment from AMAL because the terms of employment with AMAL were unfavorable. In the same letter, the applicant also sought clarification on the following terms and services which the applicant was entitled at the material time:

(i) continuity of service;

(ii) retirement benefits;

(iii) medical benefits; and

(iv) other benefits.

[7] The first respondent did not reply. Instead reference was made to the previous letters and requested that the applicant to report for duty on 3 February 1998. She was also asked to utilize all outstanding leave with the first respondent.

[8] On 3 February 1998, the applicant pleaded constructive dismissal on the ground that the first respondent had no right in law to transfer her to the subsidiary and that she was being transferred on terms and conditions less favorable which amounted to a fundamental breach of her contract of employment with the first respondent.

[9] The Industrial Court rejected the applicant's claim for constructive dismissal. Hence, this application for judicial review by the applicant.

Issues

[10] The main issue before this court is whether the first respondent had breached a fundamental terms of the contract of employment with the applicant when it made the decision to transfer the applicant to its subsidiary company, AMAL.

Findings

[11] Essentially the applicant's contention is that the first respondent had no right to transfer her to AMAL and that she was being transferred on terms and conditions less favorable which amounted to a fundamental breach of her contract with the first respondent.

[12] The first respondent contended otherwise. It was the contention of the first respondent that it has the right to transfer the applicant to any associate or subsidiary

companies within the first respondent group of companies. Reference was made to the applicant's letter of appointment dated 27 July 1977 which expressly provides as follows:

> You will be required to work, as you may be directed from time to time, in any of the departments, offices, stores, factories or other places of work in Peninsular Malaysia of this Company or of any associated or subsidiary companies of this Company on such duties as may be allocated to you and your services may be transferred from time to time to or from any of these companies...

[13] It was pointed by the first respondent that, at the time of the applicant's transfer, AMAL was not only a subsidiary of the first respondent, but the first respondent was one of AMAL's shareholders and AMAL was within the first respondent group of companies. Hence, AMAL came under the definition of an 'associate companies' as stated in the applicant's letter of appointment, giving the first respondent's right to transfer the applicant to AMAL.

[14] It is an acceptable principle that the right to transfer an employee from one department to another and from one post of an establishment to another or from one branch to another or from one company to another within the organization is the prerogative of the management. In fact this right of transfer is embodied in the Industrial Relation Act 1967, where s 13 provides that a company has the right to transfer its employees within the organization so long as such transfer does not entail a change to the detrimental of an employee in regard to the terms of employment.

[15] Clearly, the right to transfer is not without restriction. In *Ladang Holyrood v Ayasamy a/l Manikam & Ors* [2004] 3 MLJ 339, Arifin Zakaria JCA (now Federal Court judge) endorsed the right of the company to transfer its employees from one company to another within its organization but subject to well recognized restrictions as set out in Ghaiye's Misconduct in Employment which are as follows:

(i) there is nothing to the contrary in the terms of employment;

(ii) the management has acted bona fide and in the interest of its business;

(iii) the management is not actuated by any indirect motive or any kind of mala fide;

(iv) the transfer is not made for the purpose of harassing and victimizing the workmen; and

(v) the transfer does not involve a change in the conditions of service.

His Lordship further went on to state that whether a transfer entails a change to the detriment of an employee in regard to the terms of employment; or whether the transfer was bona fide is a question of fact for the court to determine.

[16] The Industrial Court concluded at p 10 of the award that the transfer of the applicant to AMAL 'was merely a transfer within the group'. With respect I am unable to agree in light of the evidence adduced before the Industrial Court. To me, if it was indeed a transfer as contended by the first respondent there would be no need for a fresh letter of employment. If it was indeed a transfer one does not need

to utilize one outstanding leave. Further, if it was indeed a transfer, one does not sign a new contract with new terms and conditions.

[17] The doctrine of constructive dismissal has been expounded in the case of *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92 where it was held (at p 95):

> The common law has always recognized the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligation if the employer is guilty of such breach as affect the foundation of the contract …

Thus, in order to determine whether the first respondent is guilty of any breach that affect the foundation of the contract, it is necessary to compare the applicant's terms and conditions of service in the two organizations which are as follows:

ITEMS	**AMAL**	**NSTP**
Salary	RM6,730pm x 12 months	RM7,292pm x 12 months
Retirement Benefits	0.5 x last drawn salary x years of service with AMAL	7% of monthly basic salary
Medical Benefits		
a) General out- patient treatment	Panel doctors — up to a maximum of RM200pa (staff only)	Panel doctors — no limitation on number of visits (staff only)
b) Specialist treatment	Panel doctors recommendation up to a maximum of RM200pa (staff only)	Panel doctors recommendation; no limitation (staff only)
c) Dental treatment	Not provided	Panel dentists — no limitation on number of visits (staff only)

Hospitalization

AMAL	**(RM)**	**NSTP**	**(RM)**
Hospital Room & Board (daily max up to days)	20	Daily Rooms & Board (max 60 days)	150
Miscellaneous Service (max per disability)	2000	Intensive Care Unit (max 45 days)	200
Surgical Fees (max per disability)	3500	Hospital Supplies and Service	2000
Anesthetic Fees (max per disability)	30% of surgical fees reinbursement	Operating Theatre	875

In-Hospital Doctor's Visits (daily max up to days)	55	Pre-Surgical Diagnostic Service	350
Pre-Hospital Diagnosis Services (max per disability within 12 months prior to hospitalization)	250	Anesthetist's Fees / Basic Surgical Benefit	1050 / 3500
Pre-Hospital Specialist Consultation (max per disability within 12 months prior to hospitalization)	250	Major Surgical Bonus / Daily In-Hospitalization Diagnostic Service	10500 / 350
Ambulance Fees (max per disability)	100	Post-Hospitalization Treatment	200
Post-Hospitalization Treatment (max per disability up to 31 days following discharge from hospital)	200	Emergency Out-Patient Treatment (accident)	2000
Out-Patient Accidental Treatment (max per disability within 24 hours after the accident)	2000	Ambulance Fees	150

	AMAL	**NSTP**
Working Hours	8.30 am – 5.15 pm (Mon - Fri) 1.00 pm – 1.45 pm (Lunch) Total: 40 hours per week	9.00 am – 5.00 pm (Mon – Fri) 9.00 am – 1.00 pm (Saturday) 1.00 pm – 2.00 pm (Lunch) Total: 39 hours per week
Annual Leave	21 working days per annum (as per offer letter dated 5-1-98)	28 working days per annum

[18] A cursory comparison the basic terms such as salary, retirement benefits, medical benefits, hospitalization, working hours and annual leave, as seen from the above, clearly indicate that the terms that the applicant was enjoying at the material time with the first respondent was far more superior that given by AMAL. To me, the

drastic change amounted to a fundamental breach of contract on the part of the first respondent and the applicant was right to consider herself constructively dismissed.

[19] Another point that the Industrial Court failed to consider was that the transfer was necessitated by the closure of the SRS. Had the applicant continued to remain in the employment of the first respondent, the first respondent would have been left with no choice but to retrench her from the service. Then, termination benefits would be payable to the applicant who had served 20–21 years of service with the first respondent. This was not done. Reasonable inference can be drawn from the conduct of the first respondent that the transfer of applicant to AMAL was an attempt to avoid paying the applicant, termination benefits following the closure of SRS.

Conclusion

[20] In conclusion, I am of the view that the award of the Industrial Court, when viewed objectively is absurd and devoid of plausible justification that no reasonable person would have reached the same conclusion. To me, there had been serious errors committed by the Industrial Court. Accordingly, I have no alternative but to allow the applicant's application with costs and the case be remitted to the Industrial Court.

Application allowed.

Reported by Sally Kee